Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-920

In The Supreme Court of the United States

October Term, 1986

GEORGE P. DAKMAK,
Trustee for Bostick Foundry Company,
Petitioner

v.

LINDBERG,
A Division of Sola Basic Industries, Inc.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT LINDBERG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Should this Court grant a petition for a writ of certiorari to review this case in which a district court, having jurisdiction over the action of a debtor in bankruptcy against a defendant, enforced a settlement entered into on the record in that action, where the facts giving rise to the legal controversy are unique to the case and where the district court possessed the appropriate jurisdiction?

PARENT, SUBSIDIARIES AND AFFILIATES OF THE PETITIONER

General Signal Corporation, a New York corporation, is the wholly owned parent of Sola Basic Industries, Inc.

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The respondent Lindberg, a division of Sola Basic Industries, Inc., respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Sixth Circuit Court of Appeals' opinion in this case. That opinion is reported at 797 F.2d 280 (1986).

COUNTER-STATEMENT OF THE CASE

In February, 1979, petitioner Bostick Foundry Company, by its attorney Charles W. White, filed a civil complaint in the federal district court for the Eastern District of Michigan, Northern Division, alleging that respondent Lindberg had breached certain warranties and been negligent in the manufacture and repair of a furnace melting system that Lindberg had sold to Bostick in 1978. During the pendency of the litigation, on December 18, 1980, Bostick filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code, in the Eastern District of Michigan, Southern Division. Notice of the automatic stay was sent to Judge Harvey of the Northern Division of the Eastern District, to whom the civil action had been assigned. Bostick's civil action against Lindberg remained dormant for nearly ten months.

On August 26, 1981, the bankruptcy court issued an order authorizing and confirming the sale of certain assets, but specifically excluded Bostick's civil action against Lindberg which was to continue in district court. Shortly afterwards, trial of the case in district court was set for March 15, 1982 by Magistrate Harvey D. Walker, who had been appointed special master. Each side conducted discovery. Throughout this period, Charles White, the attorney who had originally brought suit on Bostick's behalf, continued to represent Bostick.

On February 2, 1982, Bostick, through its bankruptcy counsel, filed an Application For Authority To Employ Attorneys for Special Purposes For Debtor-In-Possession in the bankruptcy court. Bostick requested that Charles White be allowed to continue his representation of Bostick in the prosecution of its civil action against Lindberg. No objection to Mr. White's continued representation was filed by any party.

On February 27, 1982, upon motion by Lindberg, Magistrate Walker issued a Memorandum Opinion and Recommendation, recommending that Lindberg be granted a partial summary judgment on Bostick's warranty and consequential damages claims. Judge Harvey adopted Magistrate Walker's recommendation in full.

Settlement On The Day Of Trial

On the morning of March 15, 1982, all parties appeared before Magistrate Walker for trial of the remaining issues. Bostick was represented at trial by counsel Charles White and by William Shapiro, a principal shareholder of Bostick, one of its officers and directors and a major creditor.

Following a settlement conference with Magistrate Walker, Mr. White, Mr. Shapiro, and Mr. Steiner, the attorney for Lindberg, conducted settlement negotiations over the course of approximately three hours. Ultimately, the parties agreed that the claims should be settled for cash payment from Lindberg to Bostick of $40,000 and Lindberg's agreement to dismiss its counterclaim against Bostock in the amount of $50,545.45 plus interest, costs and attorney fees.

The settlement agreement was placed on the record before Magistrate Walker, in the presence of Mr. Shapiro and with the concurrence of Mr. White, Bostick's attorney. Within a week of the placement of the settlement agreement between Bostick and Lindberg on the record, Mr. White was informed by Mr. Shapiro that two banks that were creditors of Bostick had been notified of the agreement. On March 24, 1982, Mr. White spoke to Mr. David Murphy, the banks' counsel, to explain the terms of Bostick's settlement agreement, and on March 26, 1982 he discussed the settlement agreement with Mr. Robert Sandler, Bostick's bankruptcy counsel. Subsequently, Mr. White met with and spoke to both Mr. Murphy and Mr. Sandler on a number of occasions to discuss the settlement agreement. Meanwhile, on March 25, 1982, because

he had not received the documentation, Magistrate Walker ordered submission of the settlement papers within thirty days.

Efforts To Reject Settlement In Bankruptcy Court And Bostick's Failure To Take Action

A number of months later, after he had received Lindberg's settlement checks and settlement documentation, Bostick's attorney, Mr. White, stated for the first time that he believed he was required to seek bankruptcy court approval of the settlement. For reasons best known to Bostick, neither Mr. White nor Bostick's bankruptcy counsel requested bankruptcy court approval of the settlement.

In the meantime, on September 30, 1982, the two creditor-banks filed an application in bankruptcy court seeking rejection of the settlement and compromise between Bostick and Lindberg. Lindberg filed a reply requesting that the bankruptcy court dismiss the application for rejection.

Following hearing on the banks' application, the bankruptcy court entered an order on November 12, 1982 rejecting the settlement solely because it found that Bostick's creditors had not been properly notified of the settlement in advance. The court did not reach the issue of whether Bostick should be required to notify the creditors properly of its settlement agreement with Lindberg in order to afford the bankruptcy court an opportunity to rule on the question of whether the settlement was in the best interest of the estate.[1]

Lindberg filed an Application for Leave to Appeal the original Order Rejecting The Proposed Compromise in the United States District Court for the Eastern District of Michigan, Southern Division. On December 23, 1982, the district court denied the application for interlocutory appeal, after

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[1] The bankruptcy court also denied Lindberg's motion for reconsideration and rehearing.

observing that interlocutory appeal should be used only in extraordinary cases and not merely to provide review of difficult rulings in hard cases. The court found only that extraordinary circumstances justifying an interlocutory appeal did not exist in this case.

Appointment Of New Counsel For Bostick

In the meantime, on December 3, 1982, the bankruptcy court appointed new counsel, Timothy Wittlinger, to conduct the Bostick-Lindberg litigation in district court effective November 30, 1982. Mr. Wittlinger was no stranger to the case. In fact, as Charles White stated in an affidavit filed in bankruptcy court before the scheduled trial in March, 1982, Bostick's principal shareholder, William Shapiro, had asked Mr. White if he would object to having Mr. Wittlinger join him as co-counsel. A week before the March 15, 1982 trial date, Mr. Wittlinger sought an adjournment of the trial, but his request was denied. Mr. Wittlinger, therefore, declined to appear in the case at that time.

In the same December 3, 1982 order appointing Mr. Wittlinger, the bankruptcy court approved Mr. White's representation of Bostick *nunc pro tunc* for the period December 18, 1980 to November 29, 1982.

Lindberg's Efforts To Have Settlement Approved And Bostick's Withdrawal Of Settlement Offers

On December 7, 1982, Lindberg filed its own Application For Approval Of Settlement And Dismissal Of Lawsuit. Proper notice to the creditors of the hearing on Lindberg's application for approval of the settlement was served on all interested parties pursuant to the bankruptcy rules. On December 23, 1982, Bostick's former attorney Charles White also filed an Application For Order Authorizing Compromise of Litigation.

By letter dated December 10, 1982, however, Bostick's newly appointed counsel, Mr. Wittlinger, wrote to Lindberg to attempt to withdraw "any and all offers of settlement" and "any and all acceptances of any settlement offers previously made by it or its attorneys in this matter." Furthermore, Mr. Wittlinger stated that Bostick "consider[ed] such acceptances, if any, null and void."

On January 11, 1983, at the hearing on the applications filed by Lindberg and Mr. White to have the settlement approved, the bankruptcy court decided that if, as was asserted, Bostick's newly appointed counsel had the authority to revoke the settlement agreement which had been entered into by Bostick's former counsel and made a matter of record in the district court, the court would allow such revocation. The bankruptcy court therefore refused to consider the question of whether the settlement was in the best interest of the estate.

Lindberg's Motion To Enforce The Settlement In District Court

Lindberg, therefore, was left in limbo, with a valid settlement agreement it believed enforceable in the district court, which Bostick's newly appointed counsel claimed it could revoke unilaterally. The bankruptcy court refused to approve or disapprove the settlement because Bostick claimed to have revoked its acceptance and refused to request approval. The bankruptcy court did, however, find that "the parties may have their remedies against any party. . . for whatever they claim flows from this decision."

Lindberg therefore moved in the district court before which the settlement had been placed on the record to enforce the settlement and dismiss Bostick's complaint. In a Memorandum Opinion And Order dated June 27, 1985, the district

court granted Lindberg's motion. In its Memorandum Opinion And Order, the court stated:

> Although Bankruptcy Rule 919(a) provides that the Bankruptcy Court may approve a compromise or settlement, those rules govern the procedure in Bankruptcy Court and do not eliminate the jurisdiction of a district court in a related case.
>
> * * *
>
> [T]he Court believes the settlement agreement in this case should be enforced. This Court retained jurisdiction over the matter and Mr. White was the authorized representative of plaintiff Bostic [sic] when the agreement was reached. The case was not removed to the Bankruptcy Court, nor was a stay imposed. The Court does not believe Bankruptcy Rule 919(a) should be applied to this matter to prevent the agreement which was knowingly and validly entered into before this Court properly exercising jurisdiction.

Judgment "that the plaintiff take nothing and that this action be dismissed on the merits" was entered on June 27, 1985. Bostick appealed from entry of this judgment to the Sixth Circuit Court of Appeals.

The Sixth Circuit affirmed the district court's decision granting Lindberg's motion to affirm the settlement concluded on March 15, 1982 and to dismiss Bostick's complaint with prejudice. The court of appeals, recognizing the broad, inherent authority and equitable power of a district court to enforce an agreement in settlement of litigation before it, held that the district court possessed continuing jurisdiction that supported its enforcement of the settlement of the case properly pending before it.

REASONS THE PETITION SHOULD BE DENIED

1. The Court Should Not Review This Matter Because The Facts Giving Rise To The Legal Controversy Are Unique To This Case And Unlikely To Recur.

Sup. Ct. R. 17 sets forth the character of reasons this Court may consider in deciding whether to grant a petition for certiorari. None of those reasons is applicable in this case. The Sixth Circuit has not "rendered a decision in conflict with the decision of another federal court of appeals on the same matter." Petitioner cites no case from any court which, on similar facts, has held as petitioner argues the Sixth Circuit should have held. Indeed, there is no other reported case with the unique facts of this case. Nor has the Sixth Circuit "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Finally, in its decision, the Sixth Circuit has not "decided an important question of federal law which has not been, but should be, settled by this Court."

Neither a great deal of money nor an important legal principle is at issue in this case. The parties settled the case for $40,000. The facts are unique to this case: they will rarely, if ever, occur again. Very few other persons or parties, if any, will be affected by the case because the facts are *sui generis*. Although the issue may be important to Bostick, it is not of interest and importance to the public and, accordingly, is not worthy of consideration by this Court. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

As the Sixth Circuit stated, "[t]he procedural history of the instant case is somewhat involved." 797 F.2d at 280. So involved is it, in fact, that it will undoubtedly never be repeated. In this case, although Bostick claimed that it believed the settlement had to be approved by the bankruptcy court, it took absolutely no steps — timely or otherwise — to secure such approval. Indeed, the first time the bankruptcy court considered any aspect of the settlement was upon an application filed by two of Bostick's creditors asking the court to reject the settlement and not because of any action taken by Bostick. In rejecting the settlement, the bankruptcy court never considered whether it was in the best interest of the estate but made its decision on the procedural basis that the creditors had not been properly notified of the settlement in advance. Even then, although professing to agree with the decision of the bankruptcy court, Bostick took no steps to see that the creditors were properly notified, as the bankruptcy court apparently believed they should have been.

In December, 1982, *at Bostick's request*, the bankruptcy court not only approved the employment of new counsel, Timothy Wittlinger, to represent Bostick in the district court matter, but it also — at Bostick's own request — approved the employment of Charles White *nunc pro tunc* for the period December 18, 1980 to November 29, 1982. Bostick *itself* asked that Mr. White's previous actions, which included entering into the settlement agreement, be approved, and the bankruptcy court agreed to so approve them.

On December 10, 1982, however, Mr. Wittlinger withdrew from the settlement Bostick had knowingly entered into (as if he had the power to do so) and did not seek bankruptcy court approval of the settlement. Even when, on January 11, 1983, there was an opportunity for the bankruptcy court to consider the merits of the settlement (if such consideration was even necessary, as Bostick asserted and continues to assert), Bostick would not assent to or allow that consideration.

Rather, it claimed the authority to revoke the settlement into which it had entered on the record in the district court and the bankruptcy court erroneously allowed it to do so.

These complicated and unique facts generated the legal controversy in this case. They are unlikely to recur in the same way so as to give rise to the same legal controversy in any other case. Rare will the occasion be when (a) a debtor enters into a settlement on the record in a district court proceeding then, (b) months later, after sitting on its hands for the entire time, asserts that the settlement must be approved by the bankruptcy court, (c) takes no steps whatsoever to have that court consider the merits of the settlement, (d) secures bankruptcy court approval *nunc pro tunc* of the actions of the attorney who represented it in the district court at the time the settlement was entered into, and then, (e) after new counsel is appointed, withdraws from the settlement.

Not only does the unique factual setting militate against grant of the petition, but the gross misconduct of the petitioner, as delineated by the facts set forth, compels denial of the petition. Bostick seeks "to eat its cake and have it too": first, by placing the settlement on the record in federal district court and then, although claiming that bankruptcy court approval was necessary, failing and refusing to present it to that court, and, second, when it appeared that the bankruptcy court might consider the matter, by withdrawing its settlement, giving the bankruptcy court nothing to decide. Bostick now claims bankruptcy court approval is necessary when Bostick itself was the party which prevented the bankruptcy court's consideration of the matter. This Court should not impart approval to such outrageous gamesmanship by granting the petition for certiorari.

2. The Sixth Circuit Court of Appeals Properly Held That The District Court Had The Power And Jurisdiction To Enforce The Settlement Entered Into On The Record Before It.

It is well established that district courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them. *Kukla v. National Distillers Products Co.*, 483 F. 2d 619 (6th Cir. 1973). After such a settlement is reached, a court will not inquire into the merits of the original cause of action. *Clinton Street Greater Bethlehem Church v. City of Detroit*, 484 F. 2d 185 (6th Cir. 1973). Settlements knowingly made in open court should not be upset because of any subjective hesitation or secret reservation on the part of either party.

Here, with both parties at the court and prepared for trial, a settlement was reached on the day of trial and made a matter of record. No mention was made of any reservation of authority. Lindberg prepared the necessary paperwork and tendered to Bostick the amount of the settlement. The court ordered submission of the documentation. Almost a year later Bostick hired new counsel and attempted to withdraw its acceptance of the settlement. Allowance of that withdrawal would have been patently unfair to the court and Lindberg.

Bostick claims that the district court did not have the authority to enforce the settlement. This position misapprehends the power and jurisdiction of the district court and ignores the very background of this case. There can be no claim that the attorney who originally accepted the settlement in the district court on behalf of Bostick did not have his client's authority to settle the case. Bostick itself, in the person of an officer and director, was in attendance. The only argument which the petitioner had made to justify its attempt to back out of its agreement is its after-the-fact theory that the settlement required bankruptcy court approval and therefore could not

become binding on the parties until such approval was obtained. The district court properly rejected Bostick's theory and enforced the settlement notwithstanding the petitioner's refusal to seek bankruptcy court approval. District court jurisdiction over this case and the settlement agreement is not inconsistent with Bankruptcy Rule 919(a), the procedural rule then in effect which permitted a bankruptcy court to approve a compromise or settlement. This case might have been stayed or removed to the bankruptcy court. It was not, however. Rather, at the election of the parties and with the full knowledge and approval of the bankruptcy court, the case was ordered to proceed in the district court. There was no reservation of jurisdiction or authority in the bankruptcy court. The jurisdiction of the *entire* case, including pretrial motions, trial *and settlement*, properly lay in the district court.

Although the bankruptcy court might have claimed concurrent jurisdiction or reserved to itself the ultimate power to approve or disapprove settlements, it did not do so. Except for appointing counsel to conduct the litigation in district court, the bankruptcy court not only abstained from exercising any jurisdiction but entrusted that jurisdiction to the district court. *See, e.g., In re Ricks*, 26 B.R. 134 (Bk. Ct. Idaho, 1983). District court jurisdiction was not ousted by Bankruptcy Rule 919(a). That rule, by definition, can only apply in cases over which the bankruptcy court retains or obtains jurisdiction. Bankruptcy Rule 11-1, which sets forth the scope of the Bankruptcy Court Rules in Chapter 11 cases, including 919(a), states: "The rules and forms in this Title V govern the procedure *in courts of bankruptcy* . . ." (emphasis added). The rules themselves did not pretend to extend to govern or grant jurisdiction over district court diversity cases. Compare, for instance, *In re Tidewater Group, Inc.*, 8 B.R. 930 (Bk. Ct. N.D. Ga., 1981) (settlement reached in bankruptcy court case; bankruptcy rule 919(a) applies) with *In re Neese*, 12 B.R. 968, 970 (Bk. Ct. W.D. Va. 1981) (settlement reached in related

district court case; district court has jurisdiction to enforce the settlement). Thus, the district court alone, without bankruptcy court approval, had the power and jurisdiction to decide that the settlement agreement should be enforced and dismiss the plaintiff's underlying claim.[2] Bankruptcy court acquiesence was unnecessary.

3. Pursuant To Fed. R. Civ. P. 41(b) And To Its Inherent Power, The District Court Properly Dismissed Bostick's Complaint

Fed. R. Civ. P. 41(b), as well as the inherent power of the district court to handle proceedings before it, also provides an additional reason to deny the petition for certiorari. Faced with Bostick's failure to act for over eight months after the matter was settled on the record and then with its purported withdrawal from the settlement, the district court properly confirmed the settlement and dismissed Bostick's complaint.

Fed. R. Civ. P. 41(b) states in part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

The Court of Appeals for the Seventh Circuit, in an appeal with facts similar to the facts in this case, affirmed a district court in dismissing a suit after the settlement agreement had been accepted. *Lyles v. Commercial Lovelace Motor Freight, Inc.*, 684 F.2d 501 (7th Cir. 1982). Likewise, the Sixth Circuit, in an appeal with facts not totally dissimilar to the facts in this case, affirmed the decision of a district court in dismissing a suit after settlement had been accepted (and the court had ordered the plaintiff to accept tender or suffer dismissal) relying

[2] Even the dissent in the Sixth Circuit agreed that the district court had jurisdiction to act based on the facts before it. See 797 F.2d at 285.

on the inherent power of the court to deal with abuse. *Reid v. Prentice-Hall, Inc.*, 261 F.2d 700 (6th Cir. 1958); *Refior v. Lansing Drop Forge Co.*, 124 F.2d 40 (6th Cir. 1942), *cert. denied*, 316 U.S. 671 (1942).

In this case, Bostick and Lindberg did reach a settlement which was placed on the record in the district court. Both the court and Lindberg were led to believe for a number of months that the matter had been settled. *If* the matter had to be submitted to the bankruptcy court for approval, this was Bostick's obligation. It failed and refused to do so. When it appeared that the bankruptcy court would consider the issue on the merits, it withdrew the settlement leaving the bankruptcy court powerless.

Regardless of the bankruptcy court approval issue, the district court had the power both under Fed. R. Civ. P. 41(b) and the inherent power reflected in *Reid*, *supra*, to dismiss the case.

CONCLUSION

Respondent Lindberg respectfully requests that the Court deny Bostick's Petition For A Writ Of Certiorari.

Respectfully submitted,

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